

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>ROBERT IRELAND</b>	)	
Claimant	)	
VS.	)	
	)	Docket Nos. 176,441 & 234,974
<b>IRELAND COURT REPORTING</b>	)	
Respondent	)	
AND	)	
	)	
<b>ST. PAUL FIRE &amp; MARINE INSURANCE and</b>	)	
<b>UTICA NATIONAL INSURANCE COMPANY</b>	)	
Insurance Carriers	)	
AND	)	
	)	
<b>KANSAS WORKERS COMPENSATION FUND</b>	)	

**ORDER**

Respondent and Utica National Insurance Company (Utica), one of respondent's insurance carriers, appeal from an Order dated November 25, 1998, which granted claimant's request for preliminary hearing benefits. Administrative Law Judge Bruce E. Moore also ordered respondent and Utica to pay for those benefits.

**ISSUES**

In their Notice of Appeal to the Board, respondent and Utica stated that they were requesting review of the following issues:

The Administrative Law Judge exceeded his authority of [sic] jurisdiction in finding that the claimant suffered personal injury by accident arising out of and in the course of his employment; that timely notice was given under K.S.A. § 44-520.

In their brief, however, the notice issue is abandoned. Instead, respondent and Utica state the issues as:

Appellant herein contends the Administrative Law Judge exceeded his authority in [sic] jurisdiction in issuing his Order of November 25, 1998, by determining claimant met with personal injury by accident arising out of and in the course of his employment and exceeded his jurisdiction in awarding the claimant temporary total disability compensation in violation of K.A.R. 51-3-5a.

But respondent and Utica's brief also states:

Appellant contends the claimant did not meet with personal injury by accident arising out of and in the course of his employment, but rather experienced the worsening of his original condition as a natural and probable consequence of an original injury occurring February 11, 1993. That February 11, 1993, accident claim resulted in an Award in Docket Number 176,444, and Appellant contends the parties to that Award should be responsible for the claimant's current compensation requests.

Utica is the insurance carrier in Docket No. 234,974. St. Paul Fire & Marine Insurance (St. Paul) is respondent's insurance carrier in Docket No. 176,444. The respondent is the same in both docketed claims.

Thus, although respondent and Utica attempt to describe the issue as one of compensability, it is clear from the briefs that the issue is really the date(s) of accident for the sole purpose of determining which of respondent's insurance carriers should pay for the preliminary hearing benefits ordered.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the record and considering the arguments presented, the Appeals Board finds and concludes that the Administrative Law Judge did not exceed his jurisdiction in granting the relief requested at the preliminary hearing and, for the reasons stated below, the Appeals Board does not have jurisdiction to review the issues raised by this appeal from a preliminary hearing.

There is no dispute concerning the compensability of claimant's injury. The Administrative Law Judge ordered Utica to pay because "the court is persuaded that the evidence supports the conclusion claimant has suffered a new injury as a result of the July activities. . . . there is uncontroverted evidence of physical activity which resulted in a significant increase in claimant's discomfort."

K.S.A. 1998 Supp. 44-551(b)(2)(A) limits the jurisdiction of the Appeals Board to reviewing preliminary hearing orders only in cases where one of the parties has alleged the Administrative Law Judge exceeded his or her jurisdiction. This jurisdiction includes the specific issues identified in K.S.A. 1998 Supp. 44-534a. A contention that the

Administrative Law Judge has erred in his finding that the evidence shows a new injury by repetitive use or mini-traumas as opposed to a natural progression from the earlier accident with the same employer is not an argument the Appeals Board has the jurisdiction to consider on an appeal from an order entered pursuant to K.S.A. 1998 Supp. 44-534a.

The arguments pertain to what date of accident should control for purposes of determining which insurance carrier is liable. This does not give rise to a disputed issue of whether claimant's injury occurred as a result of an accident which arose out of and in the course of claimant's employment with respondent. Whether claimant suffered one accident or two and the date of accident do not alter the fact that the present injury is the result of claimant's employment with respondent. That fact appears to be undisputed.

The Appeals Board likewise finds it does not have jurisdiction of this appeal from a preliminary hearing order because respondent and Utica's arguments also fail to raise a jurisdictional defense. The Appeals Board has previously held that the certain types of defenses contemplated by K.S.A. 44-534a(a)(2), are defenses which go to the compensability of the claim. See Cockerham v. Nichols Fluid Service, Docket No. 201,867 (Feb. 1996). As indicated above, the issues raised by this appeal do not fall within that category. Furthermore, it is inconsistent with the intent of the Workers Compensation Act for a respondent to delay preliminary hearing benefits to an injured employee while its insurance carriers litigate their respective liability. The employee is not concerned with questions concerning this responsibility for payment once the respondent's general liability under the Act has been acknowledged or established. Kuhn v. Grant County, 201 Kan. 163, 439 P.2d 155 (1968); Hobelman v. Krebs Construction Co., 188 Kan. 825, 366 P.2d 270 (1961).

Finally, respondent argues that the Administrative Law Judge exceeded his authority in awarding claimant temporary total disability compensation before the filing date of claimant's E-1 Application for Preliminary Hearing because there is no evidence of "highly unusual circumstances" as required by K.A.R. 51-3-5a. This argument also fails to raise a jurisdictional issue or defense. There is no longer any requirement that the Administrative Law Judge find unusual circumstances before awarding compensation for the period of time prior to the filing date of the application. That language was deleted from K.A.R. 51-3-5a by the amendments that became effective on May 22, 1998. The award of temporary total disability compensation is controlled by K.S.A. 1998 Supp. 44-534a(a)(2) which provides in pertinent part that:

If temporary total compensation is awarded, such compensation may be ordered paid from the date of filing the application, except that if the administrative law judge finds from the evidence presented that there were one or more periods of temporary total disability prior to such filing date, temporary total compensation may be ordered paid for all periods of temporary total disability prior to such date of filing.

Clearly, the Administrative Law Judge was within his jurisdiction when he determined the date temporary total disability compensation should commence.

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that it does not have jurisdiction to review at this juncture of the proceedings the preliminary hearing Order entered by Administrative Law Judge Bruce E. Moore, dated November 25, 1998, and that this appeal should be, and the same is hereby, dismissed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of February 1999.

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BOARD MEMBER

c: David H. Farris, Wichita, KS  
Kristine A. Purvis, Overland Park, KS  
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Edward D. Heath, Jr., Wichita, KS  
Bruce E. Moore, Administrative Law Judge  
Philip S. Harness, Director